No. 3462

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, otherwise referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

(On Habeas Corpus),

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

GEO. A. McGOWAN,
Bank of Italy Building, San Francisco,
Attorney for Appellants and Petitioners.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now the appellants Ng Fung Ho, Ng Yuen Shew, Gin Sang Get and Gin Sang Mo and file this their petition for a rehearing of the issues raised herein. The appellant Lui Yee Lau, otherwise

referred to as Louie Pon, accepts the judgment rendered herein and does not join in this petition.

This court in its decision herein holds that the last General Immigration Act, that of February 5, 1917, is retroactive in this that it permits of the trial and deportation by *executive process* of Chinese found in this country in violation of the Chinese Exclusion Acts, irrespective of whether their entry had preceded the taking effect of the last General Immigration Act or not. This in its effect partially circumvents the decision of the Supreme Court in the *Woo Jan* case (245 U. S. 552) wherein it was held that Chinese persons could not be so deported, but if removed at all it should be by *judicial process.*

Since the submission of this case to this court the Supreme Court has had occasion to advert to the decision in the *Woo Jan* case in a way and manner which leads us towards the conclusion that that august tribunal does not regard that decision as having been so circumvented in the actual operation of the Chinese Exclusion Acts. The case referred to is that of *White v. Chin Fong,*.....U. S....., decided on May 17, 1920. There is another thought that tends to confirm this view. The *Woo Jan* case was decided by the Supreme Court almost one year after the Immigration Act of February 5, 1917, was adopted. It is quite probable that this last mentioned act, being then prevailing law, was a present and operative factor in the mind of the court when, in concluding its decision in that case, it held:

> "This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act. They are addressed under treaty stipulations to laborers only. Other classes are not included in their limitation and it was provided by treaty that the limitation or suspension of the entry of laborers should be reasonable. The questions therefore which could arise were deemed different from any under the Immigration Act, and the Exclusion Laws are adapted to them and their procedure is hence saved by Section 43."

In the recent case of *White v. Chin Fong, supra,* the Supreme Court speaks in this manner of the *Woo Jan* case:

> "In the case of United States v. Woo Jan, 245 U. S. 552, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who had been in the United States and has departed from it with the intention of returning is entitled under existing legislation to have his right to do so judicially investigated with 'its assurances and sanctions', as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action."

As affecting the present litigation we are confronted with the fact that Ng Fung Ho, a returning merchant with an investigated status as a merchant, would be entitled to a judicial determination of his right to re-enter, had that right been withheld. Can it by any parity of reasoning be held that his

rights are any less because of his regular entry upon the order of the commissioner? Can he be deported by a less formal proceeding than he is entitled to in asserting his right of entry? We think not. Ng Yuen Shew was landed upon appeal by the secretary as his son. As to Gin Sang Get and Gin Sang Mo, they are citizens, but their rights as such cannot be less than that of the alien merchant as has been held by this court in *Tsoi Sim v. U. S.,* 116 Fed. 920, 925. All of these remaining four appellants were regularly admitted into the United States by the appropriate immigration officials after due examination and determination of their respective rights of admission, and long after the consummation thereof. The action of the secretary is clearly against the explicit language of the Chinese Exclusion Law which requires a *judicial hearing and determination.* The conclusion of the decision in *White v. Chin Fong, supra,* is as follows:

> "The Government appeals against the explicit words of the provision of the exclusion laws, which is, it is said, to keep the country free from undesirable Chinese, or if they fraudulently enter, to expel them, and, it is insisted, that it would be a perfunctory execution of the purpose to let one in who may be immediately put out again. That intention, it is urged, should not be ascribed to the laws, and in emphasis, it is said, 'such a legislative absurdity is unthinkable'. But this overlooks the difference in the security of judicial over administrative action, to which we have adverted, and which this Court has declared, and in the present case the right that had been adjudged and had been exercised in reliance upon the adjudication."

There is a still more recently decided case by the Supreme Court, that of *Kwock Jan Fat v. White,* .....U. S....., decided June 7, 1920. In that case, which was of a native-born American citizen of the Chinese race seeking readmission, the court held:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country",

and concluded as follows:

> "The practice indicated in Chin Yow v. United States, 208 U. S. 8, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits."

These two decisions comprise what might be termed *the last word,* from the Supreme Court upon the subjects involved. We feel that they cannot but have a beneficial effect upon the rights of these appellants and that they are a sufficient warrant for the according of a judicial hearing for the final determination of the continued right of residence of all four of these petitioners and the continuation of the right of citizenship of the last two of appellants.

It is respectfully requested that a rehearing be accorded to these four petitioning appellants.

Dated, San Francisco,
August 4, 1920.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that the said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 4, 1920.

GEO. A. MCGOWAN,
Counsel for Appellants and Petitioners.